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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 814

ERNEST P. WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11–20; R. 60–72) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956 (R. 74). The petition for a writ of certiorari was filed on March 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, a United States Army Colonel, had sufficient authority in relation to the subject matter for which bribes were given to render him punishable under 18 U. S. C. 202.

STATUTE INVOLVED

18 U. S. C. 202 provides:

> Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding

any office of honor, trust, or profit under the United States.

* * * * *

STATEMENT

In the United States District Court for the Eastern District of South Carolina, petitioner, together with Everett L. Dean, was charged in an eleven-count indictment (R. 3–12) with soliciting and accepting bribes to influence his action on behalf of the United States and with conspiracy to do so. 18 U. S. C. 202, 371. He was convicted by a jury on all counts submitted to it[1] and was sentenced to one year imprisonment and a $200 fine on each of counts 5, 6, 7, 8 and 9, and three years' imprisonment and a $200 fine on count 11, with sentences on all counts except 5 to run concurrently and to be suspended on five years probation (R. 23). On appeal the conviction was unanimously affirmed (R. 60–72, 74).

The facts pertinent to the issues raised by the petition for a writ of certiorari may be summarized thus:

From August 31, 1951, until January 14, 1953, petitioner was Adjutant General at Fort Jackson (R. 12). As such, his duties embraced general

[1] Count 10 concerning acceptance of money on June 18, 1953, was voluntarily withdrawn by the Government. Counts one to four concerned Dean alone and were not at issue in petitioner's trial, which followed Dean's. Dean had pleaded guilty on the third day of his trial.

supervision over all activities within the Adjutant General's Section including issuance, enforcement, and possible change of regulations with respect to the soliciting and sale of insurance to soldiers at the base (R. 46, 14). His position was in a chain of command which included the Insurance Officer (co-defendant Dean), the latter's immediate supervisor, the "A. G. Executive Officer," the Adjutant General (petitioner), the Judge Advocate General, the Inspector General, the Chief of Staff, and the Commanding General (R. 14).

On January 14, 1953, petitioner was relieved of his assignment as Adjutant General and was placed in a duty unassigned status, "left free to pursue his own activities" (R. 12, 13). He was next assigned to duty in September 1953 as "Assistant G–3," and in November 1953 was ordered to a Transfer Center and retired from the Army (R. 13).

Kenneth Mason, an insurance salesman, testified that in February 1953, he received a telephone call from a man who, refusing to identify himself, inquired whether he would like to work at Fort Jackson, and told him that Captain Dean "was interested in having someone work out there," with eight or ten agents (R. 15, 17). They "would be given little extra favors so to speak"; and in return for that "they would probably want some money" (R. 15, 33). Mason

already knew Dean, who was Post Insurance Officer (R. 15). The caller arranged that Mason meet Dean at the drive-in on Sumter Highway (R. 15, 34). At the meeting Dean told Mason that he was in the process of changing the Post Regulations so that a number of people whom he recommended could work at the base but that he would need three thousand dollars (R. 16). Mason obtained two thousand dollars by borrowing and paid it to Dean next night, in ten and twenty dollar bills, getting no receipt (R. 16, 17). A few days later Mason paid Dean another eight hundred dollars (R. 18). In return for this, Mason was to assign to sell insurance to the trainees at Fort Jackson ten men who would not misrepresent their policies (R. 17). Mason started assembling a crew in Columbia, South Carolina (R. 18).

By May 31st, Mason's men had not been allowed to start selling at the base and Mason had gone home to Birmingham (R. 34). There he received a long distance call from Dean who told him that the Post had a new adjutant, Colonel Russell (R. 34). Dean asked Mason to come back to Columbia to meet him and told him that more money would be needed (R. 35). He arranged a clandestine meeting at the same drive-in and instructed Mason, on leaving him, to drive to a cemetery entrance where he would find a man sitting waiting whom he should address as Colonel Russell (R. 35). Mason met

Wilson who represented himself to be Colonel Russell (R. 35, 36). Petitioner told Mason that "he had just arrived there * * * that he could get the memorandum changed * * * and everybody would be happy * * *" and that he would have to have twenty-five hundred dollars (R. 36). Mason protested that he had already paid Dean $2,800 for the same privilege and petitioner told him that, if he did not pay, another group of insurance men would be allowed in (R. 36). Mason went back to Birmingham, borrowed on his furniture and car and raised the money which he gave to petitioner on June 5th, believing that he was dealing with Colonel Russell (R. 36). A short time later petitioner called Mason and demanded fifteen hundred dollars more (R. 37). Mason succeeded in raising the additional money which he paid in two installments, eleven hundred to petitioner in Mason's car and four hundred to Dean for "Colonel Russell" (R. 38).

Dean testified (R. 39) that Wilson told him that he had talked to Mason and that Mason would be out to see him (R. 39, 40). Dean also testified that "two or three months after February" Colonel Wilson "told me to tell Mason that the new A. G. wanted to see him" and that he did so; that he (Dean) took Mason to the neighborhood where he was to meet Colonel Russell, and went on home (R. 41–45). A few days later Dean inquired of Wilson how he made out and Wilson replied "Okay" (R. 42).

When the post was not opened to the sales crew, discontent on Mason's part (R. 50–56) resulted in exposure of the scheme (Pet. 4).

ARGUMENT

1. Petitioner does not contest his conviction for conspiracy to commit bribery. Since the sentences on the other counts which were suspended run concurrently with the conspiracy sentence, the only count of materiality here is Count 5 (R. 5) which charges that, in June 1953, petitioner and Dean asked for money with intent to have their official decisions with respect to regulation of the sale of life insurance influenced thereby.

Petitioner contends (Pet. 5–8) that his actions in demanding money of Mason do not constitute a violation of 18 U. S. C. 202 because at the time he, posing as Colonel Russell, solicited the money (the act on which Count 5 is based) he was in an unassigned status with no official duties to perform in the matter of insurance sales regulation. He argues (Pet. 7) that his use of a fictitious name is itself a sign that he knew he had no power to influence official action.

Petitioner, however, was in fact an officer of high rank in the Army. He clearly did have power to influence Dean who did have official duties relating to insurance regulation, a fact of which Mason was aware. Petitioner's position in the Army at the particular post to which he

was assigned was the factor which made it possible for him to get bribes from a person who was dealing with the Army. That was enough to make him amenable to Section 202. As was said in *Canella* v. *United States,* 157 F. 2d 470, 481 (C. A. 9), "whenever officers of the United States Army take any action whatever in regard to the army their official duties are involved."

18 U. S. C. 202 punishing bribetakers (like its companion statute (18 U. S. C. 201) which punishes bribegivers) uses broad language commensurate with the fidelity required of officers handling the affairs of the United States in fiduciary capacities:

> Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof * * * asks, accepts, or receives any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, * * *.

The statute speaks of matters which may come before the potential bribetaker in his official capacity or in "his place of trust or profit." Regardless of his current duty assignment petitioner

held a position of trust and profit as a commissioned officer, and it is clear that any action in such capacity is within the class of conduct which the statute was designed to protect from corruption.

Lack of final authority or effective control with respect to the subject matter of the bribe has consistently been held no bar to conviction for acceptance of bribes under the statute. In *United States* v. *Holmes,* 168 F. 2d 888 (C. A. 3), the court affirmed conviction of an OPA investigator for acceptance of a bribe in connection with overceiling sales by a meat dealer, though the defendant had already turned in to his superiors a report of the violations, so that the matter was thereafter seemingly beyond his authority or control. And in *Whitney* v. *United States,* 99 F. 2d 327 (C. A. 10), defendant's conviction for soliciting bribes for recommending approval of sales of tombstones for Indians was affirmed, though the evidence showed that defendant's duties as a senior clerk in the Indian agency were purely routine and consisted in assembling necessary data for submission of bids, without any authority for decision in the matter. The court held that "It does not matter whether, when accepting a bribe to do an act apparently within his jurisdiction, he actually had such jurisdiction". To the same effect are *Krogmann* v. *United States,* 225 F. 2d 220, 225 (C. A. 6);

Hurley v. *United States*, 192 F. 2d 297 (C. A. 4); *Cohen* v. *United States*, 294 Fed. 488 (C. A. 6), certiorari denied, 264 U. S. 584; *Rembrandt* v. *United States*, 281 Fed. 122 (C. A. 6), certiorari denied, 260 U. S. 731. Cf. *United States* v. *Birdsall*, 233 U. S. 223; *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9); *Cohen* v. *United States*, 144 F. 2d 984 (C. A. 9), certiorari denied, 323 U. S. 797, rehearing denied 324 U. S. 885.

In *United States* v. *Hood*, 343 U. S. 148, 151, appellees were indicted for soliciting contributions in consideration of a promise to exert influence in obtaining "appointive office * * * under the United States". The trial court had dismissed certain counts of the indictment on the ground that the positions in question were not in existence at the time of the solicitation nor at any time thereafter up to the return of the indictment. This Court reversed, in language apposite to petitioner's case:

> "This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. Dealing in futures also discredits the processes of government. There is no indication that this statute punishes delivery of the fruits of the forbidden transaction—it forbids the sale. The sale is what is here alleged. Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis

for allowing a breach of warranty to be a defense to corruption."

2. There is no foundation for petitioner's contention that there is conflict in the United States Courts of Appeals in the interpretation of this statute.

The only case cited which appears even superficially in conflict is *Blunden* v. *United States*, 169 F. 2d 991 (C. A. 6) where Blunden's conviction of bribing Flisek, a civilian chief of a stock control division of an ordnance depot, was reversed. Flisek had under his control property designated as "mission" property received for issuance to the Army and "surplus" property, which was under the War Assets Administration (not the Army) and over which Flisek's authority extended only in moving it within the depot. Defendants, who were interested in obtaining surplus property for resale, obtained from him a promise to earmark certain motors for their account and to notify them when they were ready. The motors were mission property, not surplus property. In reversing the conviction, the Court of Appeals held that Flisek's complete lack of authority in the premises made his conduct tantamount to stealing the property[2] and that the bribe was therefore not to influence official action.

[2] The opinion states that Flisek had been convicted of stealing the property.

While the *Blunden* decision is open to question,[3] the differences between it and this case are such that there cannot be said to be a conflict between the two circuits. Flisek, the bribetaker, in effect merely stole Government property and transferred it to the bribegivers whereas petitioner solicited and accepted money for the purpose of having Army regulations changed in favor of the bribegivers. Flisek was a civilian employee of relatively low rank who had no authority over the disposition of the property which he stole. Wilson was an officer of high rank who, though not assigned to duty with respect to the particular subject matter at the time of his offense, nevertheless was able to exert influence in order to have an inferior officer so assigned undertake a bribery scheme with him.

The Sixth Circuit in *Blunden* adhered to the principle enunciated in its prior decision in *Rembrandt* v. *United States,* 281 Fed. 122 certiorari denied, 260 U. S. 731 and *Cohen* v. *United States,* 294 Fed. 488 certiorari denied, 264 U. S. 584, holding that the bribery statutes cover officers whose "advice and recommendation" would be influential in securing the desired decision, even though the employee did not have authority to make the final ruling. 169 F. 2d at p. 994. The

[3] The Fourth Circuit did question it in *Hurley* v. *United States*, 192 F. 2d 297, 300.

same court reiterated the principle in *Krogmann* v. *United States*, 225 F. 2d 220, 225 (C. A. 6), cited by petitioner as authority for his position. That principle is sufficient for this case.

3. Petitioner argues that there was error in the holding of the Court of Appeals that he could be found guilty under the facts proved as an aider and abettor of Dean and thus a principal under 18 U. S. C. 2. The court's ruling in this respect is not necessary to its decision since it found petitioner guilty as a principal. Particularly in relation to Count 5, where Dean set up the meeting between Mason and petitioner posing as the Adjutant General, after Dean had failed to keep his former promises, the aider and abettor theory has considerable merit. We do not rely on it, however, not because petitioner was not charged as such,[4] but because it does not appear that the case was submitted to the jury on this basis.

CONCLUSION

The judgment below is in accord with established principles of law and there is no conflict in interpretations of the statute in the Court of Appeals. It is therefore respectfully submitted

[4] Since under 18 U. S. C. 2 an aider and abettor is a principal, the indictment may properly charge him as a principal.

that the petition for a writ of certiorari should be denied.

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